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SUBJECT: Canada Asks U.S. to Change Rule on Insurance
for Cross-border Motor Carriers - In Accordance with
SPP Objectives

1. During a September 26 financial services roundtable discussion with Consulate and embassy officials, leaders of the Canadian insurance industry advised that the Government of Canada would soon request changes to the U.S. policy on the certification of insurance coverage for cross-border motor carriers. The September 29, 2005, Petition for Rule Making (contained in para 2), provided to us by an insurance industry contact, asks the U.S. to enact rules that would harmonize requirements and certification for motor vehicle liability insurance. The Canadian Embassy in Washington sent this request to the Secretaries of Transportation, Commerce, State, and Treasury on September 30. The Canadian Embassy letter argues that the requested changes would "contribute to enhancing the competitive and efficient position of North American businesses and would assist in meeting the stated goals of the Security and Prosperity Partnership (SPP)." ConGen Toronto notes that this request is consistent with the following priority area identified in the SPP "...seek ways to improve convenience and cost of insurance coverage for carriers engaged in cross border commerce."

2. Begin full copy of the Petition for Rulemaking:

September 29, 2005

Annette M. Sandberg
Administrator
Federal Motor Carrier Safety Administration
U.S. Department of Transportation
400 Seventh St. SW
Washington, DC 20590

Dear Ms. Sandberg:

Re: Petition for Rulemaking by the Government of Canada
to Amend 49 CM Part 387 (Financial Responsibility
Requirements for Motor Carriers)

Interest of the Petitioner

Part 387 of the Federal Motor Carrier Safety Administration (FMCSA) Regulations sets out the financial responsibility requirements for motor carriers. The combined effect of Part 387.7 and Part 387.11 of the Regulations is to require Canadian-domiciled motor carriers operating in any of the United States to obtain the necessary insurance coverage, in the form of the MCS-90 endorsement, from or through a U.S.-licensed insurer in addition to obtaining insurance that is valid in Canada from an insurer licensed in the province of Canada in which the motor carrier is domiciled.

The result of these requirements is an additional administrative burden, inconvenience and cost not faced by U.S.-domiciled motor carriers operating into Canada. The insurance policy issued by a U.S.-licensed insurer to a U.S.-domiciled motor carrier is accepted as valid insurance for the Canadian portion of the trip. The insurance policy issued by a Canadian-licensed insurer to a Canadian-domiciled motor carrier is not accepted as valid insurance for the U.S. portion of a trip.

The Governments of Canada and the US have taken significant steps in recent years to improve the flow of trade in North America. The Canada-U.S. Free Trade Agreement was followed by the much broader North American Free Trade Agreement (NAFTA) signed by the U.S., Canada and Mexico. The focus on trade issues has recently been reinforced by the Security and Prosperity Partnership of North America (SPP), discussed in more detail below. Cross-border motor carrier insurance issues have arisen in the context of the NAFTA treaty and the SPP initiative.

The Government of Canada has participated for many years in the work of the Trilateral Insurance Working Group, which was created by and reports to the NAFTA Financial Services Committee (comprised of senior officials from the U.S. Treasury Department, Canada's Department of Finance and Mexico's Hacienda). Its

mandate and function is to examine and seek solutions to cross-border trucking insurance issues. All members of the Trilateral Insurance Working Group have agreed that the highest and best solution to these issues is a seamless motor vehicle liability policy that would require insurance companies to provide the compulsory insurance coverages and policy limits required in any of the three NAFTA countries, regardless of the home jurisdiction of the truck and the country in which the policy is written. This would afford mutual recognition of motor vehicle liability policies written in any of the NAFTA countries.

As between Canada and the United States, one of the critical changes required in order to effect full mutual recognition of such insurance policies for commercial trucks is an amendment to the Federal Motor Carrier Safety Administration Regulations to permit insurance companies, licensed either provincially or federally in Canada, to write motor vehicle liability insurance policies, to sign the MCS-90.

The need to seek ways to improve the convenience, efficiency and cost of insurance coverage for motor carriers engaged in cross-border commerce was noted in the Security and Prosperity Partnership of North America (SPP). The establishment of the SPP was announced on March 23, 2005, by President Bush, together with the Prime Minister of Canada and the President of Mexico. The Prosperity Agenda that accompanied the Leaders' Statement of this Partnership stated, among other things, that:

"To enhance the competitive position of North American industries in the global marketplace and to provide greater economic opportunity for all of our societies, while maintaining high standards of health and safety for our people, the United States, Mexico and Canada will work together, and in consultation with stakeholders, to:

- Work towards the freer flow of capital and the "efficient provision of financial services throughout North America" (e.g., ... seek ways to improve convenience and cost of insurance coverage for carriers engaged in cross border commerce).

In furtherance of the SPP, on June 27, 2005 a Report to the Leaders was signed on behalf of the United States by the respective Secretaries of Homeland Security, Commerce and State. One of the stated initiatives in the Report, set out at page 17 under the section entitled "Financial Services", is to "Seek ways to improve the availability and affordability of insurance coverage for carriers engaged in cross-border commerce in North America". The following Key Milestone is stated for this initiative:

"U.S. and Canada to work towards possible amendment of the U.S. Federal Motor Carrier Safety Administration Regulation to allow Canadian insurers to directly sign the MCS-90 form concerning endorsement for motor carrier policies of insurance for public liability: by June 2006."

Rulemaking Requested

The Government of Canada requests that 49 CFR, Part 387.11 be amended to provide that one of the types of policies of insurance that satisfies the financial responsibility requirements set out in Part 387.9 of the Regulations is a policy of insurance issued by a Canadian insurance company legally authorized to issue such a policy in the Province of Canada in which a Canadian motor carrier has its principal place of business or domicile, and that is willing to designate a person upon whom process, issued by or under the authority of any court having jurisdiction of the subject matter, may be served in any proceeding at law or equity brought in any State in which the motor carrier operates. The Government of Canada further requests that any additional or other amendments be made to 49 CFR, Part 387 that maybe required in order to give effect to the above-referenced initiative of the Security and Prosperity Partnership of North America.

Current Means by which Canadian-Domiciled Motor Carriers are Insured for Cross-Border Commerce

Currently, there are only two insurance options available to Canadian motor carriers wishing to engage in U.S. cross-border commerce. They may obtain separate insurance policies, one valid in Canada written by a Canadian insurer and one valid in the U.S. written by a U.S. insurer. This is a very expensive

option and puts Canadian insurance companies that would otherwise earn income on policies issued to Canadian-domiciled motor carriers at a distinct trade disadvantage. It is rarely used.

The second option, which is by far the most commonly used, is for a Canadian-licensed insurer to enter into what is known as a "fronting arrangement" with a U.S.-licensed insurer whereby the U.S. insurer permits the Canadian insurer to sign the MCS-90 as its agent, and the entire risk is contractually "reinsured" back to the Canadian insurer by the US insurer. In order that the U.S. insurer is not at risk in the event of a claim against the Canadian motor carrier, the Canadian insurer of the carrier must put up an agreed-upon amount of capital under the fronting arrangement. The second option also puts Canadian insurers and motor carriers at a trade disadvantage, as the cost of entering into the fronting arrangement is borne entirely by the Canadian insurer, which it in turn passes on to the motor carrier. As well, the capital put up under the fronting arrangement by the Canadian insurer is capital taken out of the Canadian insurance marketplace, thus reducing the capital available to underwrite insurance in Canada. U.S. motor carriers and their insurers do not face these additional costs in transporting goods into Canada.

Canadian insurers are finding it increasingly difficult to find fronting partners in the U.S. This has come about because, as a result of mergers and acquisitions, there are few multinational insurers left that write motor vehicle liability (i.e. public liability) policies for motor carriers in both Canada and the U.S. It is much more difficult and much more costly to enter into such an arrangement with a company that is not part of the same corporate group. This also has the effect of limiting competition in the marketplace largely to the very few multinational insurance companies writing insurance for motor carriers on both sides of the Canada-U.S. border.

Canada Extends Full Recognition to Motor Vehicle (Public Liability) Insurance Policies Issued by U.S.-Licensed Insurers

Between the U.S. and Canada, in regard to private passenger vehicles and light trucks, there has been for many years full mutual recognition and acceptance of motor vehicle liability policies issued in either country as acceptable proof of financial responsibility. All of the American states and Canadian provinces recognize the certificate of insurance issued by a motor vehicle insurer licensed in any state of the US or any province of Canada as acceptable proof of financial responsibility for private passenger vehicles and light trucks domiciled in the jurisdiction of issue of the policy.

In addition, Canada has long extended this recognition in respect of motor vehicle liability insurance for US-domiciled motor carriers. All Canadian jurisdictions accept the signing and filing by insurers licensed in any jurisdiction of the U.S. of a Power of Attorney and Undertaking as valid proof, in Canada, of financial responsibility of U.S.-issued motor vehicle liability policies on U.S. resident motor vehicles of all categories. In essence, the Power of Attorney and Undertaking (PAU) provides that the U.S. insurer will comply with and meet the minimum compulsory coverages and policy limits required in any Canadian jurisdiction in which an accident involving its insured occurs. The PAU is similar to the combined provisions of Sub-Parts 387.11 and 387.15 (MCS-90 Form) of the FMCSA Regulations. The PAU is filed with the Canadian Council of Insurance Regulators (the Canadian equivalent to the U.S. National Association of Insurance Commissioners).

Protection for U.S. Citizens if a Canadian-Licensed Insurer is authorized to sign the MCS-90

As indicated above, the general current practice for Canadian-domiciled motor carriers operating into and throughout the U.S. is for the motor carrier's Canadian insurer to enter into a fronting arrangement with a U.S. insurer. Typically, the fronting agreement provides that the U.S. insurer will handle any claims made in the U.S. against the Canadian motor carrier in return for an additional fee to be paid to the U.S. insurer by the Canadian insurer. However, it is always open to the Canadian insurer to retain an independent insurance adjusting company in the U.S. to handle the claim on its behalf. In either case, the dollars paid to settle the claim or to pay any judgment by a U.S. Court against the Canadian motor carrier are always

paid directly by the Canadian insurer.

Motor vehicle liability laws and the judicial systems of the U.S. and Canada are very similar. The terms of Canadian motor vehicle liability insurance policies, Canadian insurance claims handling practices, and the use by Canadian insurers of independent claims adjusters located in the jurisdiction where an accident occurs to handle the front-line investigation of claims, are very similar to their U.S. counterparts. In the many decades during which Canadian vehicles, including commercial trucks, have traveled throughout the United States, there has not been one single reported incident where a Canadian insurer has failed to pay a judgment awarded against its Canadian insured to a U.S. citizen or resident to the full extent of its legal obligation to pay. Canadian motor vehicle insurers have decades of direct experience in handling motor vehicle liability claims in the U.S. through their private passenger and light truck line of business. There is no reason to expect this to change if Canadian insurers are permitted to issue proof of financial responsibility to Canadian-domiciled motor carriers by way of signing the MCS-90 Form directly rather than as the agent of a U.S. insurer.

Conclusion

Achieving a seamless motor vehicle liability insurance policy between Canada and the U.S. for motor carriers would contribute to enhancing the competitive and efficient position of North American business and would assist in meeting the stated goals of the Security and Prosperity Partnership.

We request that in view of the foregoing this petition be considered and that a Rulemaking be initiated to make the proposed amendments to the FMCSA Regulations.

Yours very truly,

Claude Carriere
Minister (Economic) and Deputy Head of Mission

Copy to:
Norman Y. Mineta, Secretary of Transportation
Carlos Gutierrez, Secretary of Commerce
Condoleezza Rice, Secretary of State
John Snow, Secretary of the Treasury

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